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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

RAHINAH IBRAHIM,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	NO. C 06-0545 WHA
	)	
DEPARTMENT OF HOMELAND SECURITY,	)	
ET AL.	)	
	)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.	)	THURSDAY
	)	DECEMBER 20, 2012
_____	)	

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**FOR PLAINTIFF**

MCMANIS FAULKNER  
50 W. SAN FERNANDO STREET  
FAIRMONT PLAZA, 10TH FLOOR  
SAN JOSE, CALIFORNIA 95113

**BY: CHRISTINE PEEK, ESQUIRE  
ELIZABETH PIPKIN, ESQUIRE**

**FOR DEFENDANTS**

UNITED STATES DEPARTMENT OF JUSTICE  
CIVIL DIVISION  
FEDERAL PROGRAMS BRANCH  
20 MASSACHUSETTS AVENUE, NW  
WASHINGTON, DC 20001

**BY: PAUL G. FREEBORNE, SENIOR TRIAL COUNSEL  
JOHN K. THEIS, TRIAL ATTORNEY**

**REPORTED BY: JOAN MARIE COLUMBINI, CSR 5435, RPR  
OFFICIAL COURT REPORTER, U.S. DISTRICT COURT**

PROCEEDINGS; THURSDAY, DECEMBER 21, 2012

**THE CLERK:** CIVIL 06-545, IBRAHIM VERSUS DEPARTMENT OF HOMELAND SECURITY.

**MR. FREEBORNE:** GOOD MORNING, YOUR HONOR. PAUL FREEBORNE FOR THE DEFENDANTS, ALONG WITH JACK THEIS.

**THE COURT:** ALL RIGHT. WELCOME TO YOU.

**MS. PEEK:** GOOD MORNING, YOUR HONOR. CHRISTINE PEEK AND ELIZABETH PIPKIN FROM MCMANIS FAULKNER ON BEHALF OF RAHINAH IBRAHIM.

**THE COURT:** YOUR NAME?

**MS. PEEK:** CHRISTINE PEEK.

**THE COURT:** AND WHO IS WITH YOU?

**MS. PEEK:** ELIZABETH PIPKIN.

**THE COURT:** ELIZABETH WHO?

**MS. PEEK:** PIPKIN.

**THE COURT:** HOW DO YOU SPELL THAT?

**MS. PEEK:** P-I-P-K-I-N.

**THE COURT:** OKAY. WE ARE HERE FOR A MOTION TO DISMISS. I HAVE READ EVERYTHING. I'LL LET YOU SAY WHATEVER BOTH SIDES WOULD LIKE TO SAY WITHIN REASON. IT'S THE GOVERNMENT'S MOTION.

**MR. FREEBORNE:** YOUR HONOR, MAY IT PLEASE THE COURT. WE ASK THE COURT DISMISS THIS ACTION FOR LACK OF STANDING, AS WELL AS ON MERITS, AS PLAINTIFF HAS FAILED TO STATE A

1 COGNIZABLE CLAIM UNDER RULE 12(B)(6). AT A MINIMUM WE WOULD  
2 ASK THE STATE DEPARTMENT BE DISMISSED AS A DEFENDANT.

3 YOUR HONOR, WE MADE AVAILABLE FOR THE COURT'S  
4 REVIEW -- FOR THE COURT'S EX PARTE AND IN CAMERA REVIEW  
5 DECLARATIONS FROM MR. CRUZ THAT SET FORTH PLAINTIFF'S STATUS,  
6 IF ANY, ON THE NO-FLY SELECTEE AND TERRORIST SCREENING  
7 DATABASE. WE BELIEVE THOSE MATERIALS DEMONSTRATE THAT  
8 PLAINTIFF LACKS STANDING AND THIS COURT LACKS JURISDICTION.

9 WE BELIEVE THERE'S AMPLE AUTHORITY, AS WE SET FORTH  
10 IN OUR BRIEFING FOR THE COURT'S REVIEW AS MATERIALS EX PARTE  
11 AND IN CAMERA, GENERALLY UNDER *MERIDIAN INTERNATIONAL*, WHERE  
12 THE COURT UNDERTOOK A SIMILAR REVIEW ON A JURISDICTIONAL ISSUE.

13 THERE'S ALSO AUTHORITY IN *GILMORE* WHERE THE COURT --  
14 THE NINTH CIRCUIT REVIEWED THE SECURITY DIRECTIVE EX PARTE AND  
15 IN CAMERA.

16 AND PERHAPS THE MOST ON POINT CASE IS THE *SCHERFEN*  
17 CASE, ALTHOUGH IT'S OUTSIDE OF THIS DISTRICT, WHERE THE COURT  
18 REVIEWED WATCHLIST STATUS ON AN EX PARTE AND IN CAMERA BASIS  
19 AND RULED BASED UPON THAT BASIS AND ISSUED AT THE REQUEST OF  
20 THE PARTIES A SEALED OPINION ON STANDING.

21 YOUR HONOR, MOVING TO THE 12(B)(6) ASPECT OF OUR  
22 MOTION, IN A NUTSHELL, PLAINTIFF HAS FAILED TO STATE A  
23 COGNIZABLE CLAIM UNDER *IQBAL*. WITH RESPECT TO THE FIRST  
24 AMENDMENT AND THE EQUAL PROTECTION CLAIM, THE CLAIMS OF  
25 DISCRIMINATION ARE CONCLUSORY AND THREADBARE AND FAIL TO

1 SUSTAIN PLAINTIFF'S BURDEN TO PLEAD A PROPER CAUSE OF ACTION  
2 UNDER *IQBAL* AND *TWOMBLY*.

3 WITH RESPECT TO THE PROCEDURAL DUE PROCESS CLAIM,  
4 YOUR HONOR, PLAINTIFF HAS FAILED TO PLEAD THE PUBLICATION OF A  
5 STIGMATIZING STATEMENT, NOR HAVE THEY SHOWN DEPRIVATION OF ANY  
6 PROPERTY OR LIBERTY INTEREST THAT WOULD TRIGGER DUE PROCESS.

7 BUT EVEN IF THEY COULD OVERCOME THAT, AS WE SET FORTH  
8 IN OUR BRIEF, THE GOVERNMENT'S CURRENT GLOMAR POLICY PREVENTS  
9 US FROM PROVIDING NOTICE OF WHETHER OR NOT SOMEONE IS ON A  
10 TERRORIST WATCHLIST. AND, CERTAINLY, WHILE PLAINTIFF CLAIMS  
11 SHE HAS A RIGHT TO BE HEARD ON HER PURPORTED WATCHLIST STATUS,  
12 THAT'S JUST SIMPLY IMPOSSIBLE GIVEN THAT THE GOVERNMENT HAS  
13 SIGNIFICANT AND, INDEED, COMPELLING --

14 **THE COURT:** WHY DIDN'T YOU MAKE THAT ARGUMENT TO THE  
15 NINTH CIRCUIT? YOU'VE GONE UP THERE TWICE AND LOST. YOU COULD  
16 HAVE MADE THAT ARGUMENT TO THE NINTH CIRCUIT AND SAID -- WHY  
17 DIDN'T YOU SHOW ALL THOSE DOCUMENTS IN CAMERA TO THE NINTH  
18 CIRCUIT?

19 **MR. FREEBORNE:** WELL, YOUR HONOR, THE GOVERNMENT  
20 MOVES WITH GREAT HESITATION IN MOVING EX PARTE. WE MOVED ON  
21 THE FACE OF THE COMPLAINT, BOTH BEFORE THIS COURT AS WELL AS  
22 THE NINTH CIRCUIT. WE ASKED THAT THE COURT RULE ON STANDING ON  
23 THAT BASIS.

24 WE ARE NOW HERE, AND THAT CASE HAS BEEN REMANDED. WE  
25 THINK IT'S APPROPRIATE AT THIS JUNCTURE THAT THIS CASE NOT GO

1 ON ANY LONGER, SO WE OFFERED THE MATERIALS EX PARTE AND IN  
2 CAMERA FOR THE COURT'S REVIEW. WE BELIEVE THAT APPROACH IS  
3 APPROPRIATE UNDER THE CIRCUMSTANCES.

4 **THE COURT:** LET'S HEAR FROM THE OTHER SIDE.

5 **MS. PEEK:** THANK YOU, YOUR HONOR.

6 ONE THING I DO WANT TO EMPHASIZE AT THE OUTSET IS  
7 THAT PLACEMENT IN THE GOVERNMENT'S TERRORIST SCREENING DATABASE  
8 IS A COMPREHENSIVE FORM OF HARM. IN OTHER WORDS, IT'S NOT A  
9 NARROW TYPE OF HARM, AND IT'S NOT JUST ONE LIST. IT'S A  
10 MULTIPLICITY OF LISTS THAT ARE ACCESSED BY A VARIETY OF  
11 DIFFERENT AGENCIES BUT IS CENTRALLY CONTROLLED BY THE TERRORIST  
12 SCREENING CENTER BASED ON NOMINATIONS FROM THE FBI OR THE NTC,  
13 WHO ARE DEFENDANTS IN THIS CASE.

14 THE LIST INCLUDES THE CONSULAR LOOKOUT AND SUPPORT  
15 DATABASE, WHICH IS MAINTAINED BY THE DEPARTMENT OF THE STATE;  
16 THE INTERAGENCY BORDER INSPECTION SYSTEM, WHICH IS THE  
17 DEPARTMENT OF HOMELAND SECURITY; THE NATIONAL CRIME INFORMATION  
18 CENTER'S VIOLENT GANG AND TERRORIST ORGANIZATIONS FILE, WHICH  
19 IS PART OF THE NCIC SYSTEM. THAT'S THE LIST THAT PETER KEITH,  
20 WHO IS THE ATTORNEY FOR THE SAN FRANCISCO DEFENDANTS IN THIS  
21 CASE, WAS REFERRING TO BEFORE WE WENT UP ON APPEAL.

22 FINALLY, THERE'S ALSO THE NO-FLY AND SELECTEE SUBSETS  
23 OF THE TERRORIST SCREENING DATABASE THAT IDENTIFY PERSONS WHO  
24 EITHER THE AIR CARRIER MAY NOT TRANSPORT OR HAVE TO BE SELECTED  
25 FOR ADDITIONAL SCREENING. SO, PLACEMENT IN THE TERRORIST

1 SCREENING DATABASE IMPLICATES ALL OF THESE LISTS, IN ADDITION  
2 TO OTHER POTENTIAL LISTS. THESE ARE JUST SOME EXAMPLES OF THE  
3 FAR-REACHING CONSEQUENCES OF BEING PLACED IN THIS LIST.

4 THE GOVERNMENT ARGUING IS PLACEMENT IN THE LIST ISN'T  
5 SUFFICIENT TO CONFER STANDING, BUT THAT'S INCORRECT. IT IS  
6 SUFFICIENT. AND THE REASONING OF THE COURT IN *SHEARSON V.*  
7 *HOLDER*, WHICH WE CITED IN OUR PAPERS, EXPLAINS WHY THAT'S THE  
8 CASE.

9 TO ADDRESS THE GOVERNMENT'S ARGUMENTS REGARDING THE  
10 PROPRIETY OF THE EX PARTE SUBMISSIONS, IN RESPONSE TO YOUR  
11 HONOR'S QUESTIONS, THEY COULD HAVE BROUGHT THAT BEFORE THE  
12 NINTH CIRCUIT. THEY DIDN'T THINK THEY HAD TO. AND SO NOW  
13 WE'RE AT THE POINT WHERE WE'RE GETTING DEEPER INTO THE FACTS,  
14 AND WE NEED DISCOVERY.

15 IT IS TO THE POINT WHERE WE LEFT OFF BEFORE WE WENT  
16 UP ON APPEAL, AND YOUR HONOR HELD AT THAT TIME THAT CERTAIN  
17 ITEMS OF SUPPOSEDLY LAW ENFORCEMENT PRIVILEGED INFORMATION HAD  
18 TO BE TURNED OVER AND STARTED TO PROVIDE A ROADMAP FOR HOW THAT  
19 MIGHT BE ACCOMPLISHED. AND PLAINTIFF'S POSITION IS THAT WE  
20 NEED TO GO BACK TO WHERE WE LEFT OFF WITH THE DISCOVERY ISSUES  
21 AND SEE IF WE CAN FIGURE OUT A WAY THAT THE DISCOVERY CAN BE  
22 PRODUCED PURSUANT TO AN APPROPRIATE PROTECTIVE ORDER SO THIS  
23 CASE CAN MOVE FORWARD.

24 I'M HAPPY TO ANSWER ANY OF YOUR HONOR'S OTHER  
25 QUESTIONS.

1           **THE COURT:** NO. THANK YOU. ALL RIGHT. ANY  
2 REBUTTAL?

3           **MR. FREEBORNE:** YOUR HONOR, WITH RESPECT TO THE  
4 PLACEMENT OF THE TSDB ALONE, FIRST OF ALL, OUR EX PARTE IN  
5 CAMERA MATERIALS SPEAK TO THIS ISSUE. I CAN'T ELABORATE ON THE  
6 PUBLIC RECORD AS TO MS. PEEK'S ALLEGATION THAT THE TSDB IS  
7 EXPORTED GENERALLY.

8           **THE COURT:** YOU JUST WANT ME TO TAKE YOUR WORD FOR  
9 IT?

10          **MR. FREEBORNE:** NO, YOUR HONOR.

11          **THE COURT:** TAKE THE WORD OF YOUR DECLARANTS WITHOUT  
12 LETTING THE OTHER SIDE HAVE A SAY ON THAT? THAT'S NOT THE WAY  
13 IT WORKS.

14          **MR. FREEBORNE:** YOUR HONOR, WHAT THE CRUZ DECLARATION  
15 DOES IS IT SIMPLY SETS FORTH PLAINTIFF'S STATUS, IF ANY, ON THE  
16 TSDB AND IN WHAT CAPACITY.

17          **THE COURT:** IF YOU ARE PREPARED TO SAY SHE HAS BEEN  
18 REMOVED FROM ANY AND ALL OF THE RESIDUAL EFFECTS, INCLUDING THE  
19 EFFECTS THAT THE STATE DEPARTMENT AND EVERY OTHER AGENCY, AND  
20 SHE'S GOT CLEAR SAILING, YOU COULD JUST SAY THAT. BUT YOU ARE  
21 NOT TELLING ME THAT.

22               I AM NOT GOING TO LOOK AT YOUR IN CAMERA SUBMISSIONS.  
23 THAT IS SO AT ODDS WITH THE WAY WE DO THINGS IN AMERICA. IT'S  
24 NOT JUSTIFIED.

25               I'M NOT GOING TO RECEIVE YOUR MATERIALS EX PARTE. I

1 AM NOT GOING TO REVIEW THEM. THE DECISIONS YOU CITE DO NOT  
2 SUPPORT THAT IN THE NINTH CIRCUIT. SO I'M GOING TO RULE ON THE  
3 RECORD I HAVE, THAT BOTH SIDES HAVE ACCESS TO.

4 **MR. FREEBORNE:** YOUR HONOR, TO THE EXTENT -- WE  
5 UNDERSTAND, THE COURT HAS DISCRETION TO ENTER AN APPROPRIATE  
6 PROTECTIVE ORDER. TO THE EXTENT THAT THE COURT PURSUES THAT  
7 AVENUE, PLAINTIFF CANNOT BE PROVIDED ACCESS TO THOSE MATERIALS,  
8 AND PERHAPS PLAINTIFF IS NOT URGING THAT SINCE MS. PIPKIN LAST  
9 TIME SAID --

10 **THE COURT:** I HAVE NEVER SUGGESTED THE PLAINTIFF HAVE  
11 ACCESS, BUT THESE TWO LAWYERS -- BY THE WAY, IS MR. MCMANIS  
12 CLEARED?

13 **MS. PEEK:** MR. MCMANIS HAS NOT YET BEEN CLEARED. WE  
14 HAVE AN APPLICATION FOR HIM AND WILL BE SUBMITTING THAT  
15 SHORTLY.

16 **THE COURT:** I AM NOT GOING TO DELAY THE TRIAL ON  
17 ACCOUNT OF -- YOU SHOULD HAVE FIGURED THAT OUT A LONG TIME AGO.

18 ALL RIGHT. HERE'S THE DEAL. I WANT TO MAKE SURE  
19 YOU'VE HAD YOUR SAY. LET THE GOVERNMENT FINISH. THE PLAINTIFF  
20 IS NOT GOING TO HAVE ACCESS TO ANYTHING THAT IS CONFIDENTIAL OR  
21 SENSITIVE. THE LAWYERS, THOUGH, SHOULD HAVE ACCESS.

22 **MR. FREEBORNE:** YOUR HONOR, IF THAT'S THE COURT'S  
23 ORDER, WE WILL ATTEMPT TO WORK WITH PLAINTIFF IN FRAMING A  
24 PROTECTIVE ORDER.

25 **THE COURT:** BY TOMORROW THERE WILL BE A RULING. YOU



1 HAVE MADE YOUR BED. YOU ARE GOING TO LIE IN IT. I AM GOING TO  
2 MAKE MY RULING. I AM NOT GOING TO WAIT FOR YET ANOTHER DELAY  
3 WHILE THE GOVERNMENT FIDDLES WHILE ROME BURNS. THIS CASE IS  
4 SIX YEARS OLD. WE ARE GOING TO HAVE A RULING BY TOMORROW AT  
5 NOON.

6 ANYTHING MORE YOU WANT TO SAY?

7 **MR. FREEBORNE:** NO, YOUR HONOR.

8 ACTUALLY, ONE ITEM.

9 SO THE COURT IS AWARE, BECAUSE MS. PEEK REFERENCED,  
10 WHAT'S INCLUDED IN THE CRUZ DECLARATION JUST GOES TO STATUS.  
11 AS THE COURT INDICATED IN ITS 2009 RULINGS, THERE ARE DIFFERENT  
12 GRADATIONS OF SENSITIVE INFORMATION. THERE'S STATUS-BASED  
13 INFORMATION. THERE'S UNDERLYING DEROGATORY INFORMATION. AND  
14 THERE'S POTENTIALLY CLASSIFIED INFORMATION. WHAT IS AT ISSUE  
15 IN THE CRUZ DECLARATION IS JUST SIMPLY STATUS-BASED  
16 INFORMATION. WE WOULD ASK THE COURT LIMIT ITS RULING THAT.

17 **THE COURT:** MAYBE. I DON'T KNOW WHETHER THAT'S TRUE  
18 OR NOT. IT WOULD BE UNFAIR FOR ME TO -- GIVEN THE HISTORY OF  
19 THIS CASE, FOR ME TO RECEIVE YOUR THINGS EX PARTE WITHOUT  
20 LETTING COUNSEL SEE THEM UNDER A PROTECTIVE ORDER. SO I'M NOT  
21 GOING TO DO IT.

22 ALL RIGHT. WE ARE GOING TO CASE MANAGEMENT.

23 CASE MANAGEMENT, MR. -- I'M NOT GOING TO CHANGE THIS  
24 TRIAL DATE. IF MR. MCMANIS -- HE'S NEVER APPEARED IN THIS CASE  
25 AND SUDDENLY HE IS GOING TO BE THE TRIAL LAWYER? YOU TWO ARE

1 DOING A GOOD JOB. YOU DON'T NEED MR. MCMANIS. HOWEVER, IF HE  
2 GETS CLEARED IN TIME, AND IF HE'S REALLY GOING TO TRY THE CASE,  
3 I WILL CONSIDER A MOTION FOR CONTINUANCE AT THAT TIME.

4 **MS. PEEK:** OKAY. THANK YOU, YOUR HONOR.

5 **THE COURT:** YOU WANT TO TRY THE CASE ON DECEMBER 28?  
6 I HAVE LEARNED THAT'S A GIMMICK. THAT'S JUST A GIMMICK,  
7 BECAUSE YOU KNOW GOOD AND WELL WHEN DECEMBER 28TH COMES, THE  
8 JUDGE IS NOT GOING TO WANT TO TRY A CASE ON DECEMBER 28TH, AND  
9 YOU WILL THEN HAVE AN EASY WAY TO SAY, OH, WELL, LET'S POSTPONE  
10 IT, LET'S POSTPONE IT. YOU ARE THE PLAINTIFF. YOU SHOULD BE  
11 WANTING THE PROMPTEST POSSIBLE TRIAL.

12 **MS. PEEK:** YOUR HONOR, WE APOLOGIZE. WE ARE  
13 CERTAINLY WILLING TO AGREE TO ANY DATE THAT IS MORE CONVENIENT  
14 FOR THE COURT.

15 **THE COURT:** I AM GOING TO LEAVE THE DATE, BUT I AM  
16 GOING TO GIVE YOU BOTH A CHANCE TO COMPLAIN ABOUT MY PROPOSED  
17 ORDER SO YOU DON'T HAVE TO FLY ALL THE WAY OUT HERE AGAIN. I  
18 SENT IT TO YOU. ANY HEARTBURN FROM THE CASE MANAGEMENT  
19 SCHEDULE?

20 **MR. FREEBORNE:** YES, YOUR HONOR. GENERALLY, WE  
21 OPPOSE ANY TRIAL NEEDING DISCOVERY. AT MOST THIS IS A RECORD  
22 REVIEW-TYPE CASE. IT IS NOT ONE THAT SHOULD BE TRIED ON A  
23 PUBLIC RECORD. IT'S A TERRORIST WATCH CASE.

24 **THE COURT:** THAT'S WRONG. THAT'S JUST WRONG.  
25 THEY'RE ALLEGING YOU DISCRIMINATED AGAINST HER ON ACCOUNT OF

1 HER RELIGION. WE ARE GOING TO HAVE DISCOVERY. WE ARE GOING TO  
2 FIND OUT HOW THE SYSTEM WORKS.

3 I RULED FOR YOU TWO TIMES. I THREW THIS CASE OUT.  
4 YOU DIDN'T TAKE IT TO THE SUPREME COURT. NOW IT'S MY JOB TO  
5 SALUTE THE NINTH CIRCUIT AND SAY "I WILL FOLLOW YOUR ORDERS."  
6 THAT'S WHAT I DO. I'M DISTRICT JUDGE.

7 MY JOB IS NOT TO ROLL OVER EVERY TIME THE GOVERNMENT  
8 SAYS, OH, WE GOT A NEW PROBLEM NOW; WE GOT A NEW PROBLEM. THE  
9 NINTH CIRCUIT SAYS THIS CASE IS GOING TO BE HEARD ON THE  
10 MERITS. WE ARE GOING TO DO THAT.

11 SO THESE TWO YOUNG LAWYERS, THEY ARE GOING TO BE  
12 GOING THROUGH YOUR SYSTEM. IT'S GOING TO BE HARD TO GO THROUGH  
13 AND FIGURE OUT WHAT THEY GET ACCESS TO. I UNDERSTAND THAT.  
14 BUT I'M GOING TO PUT THE TIME IN, AND IF WE HAVE TO SEAL THE  
15 ENTIRE COURTROOM, WE ARE GOING TO FIND OUT HOW FAIR AND UNFAIR  
16 THE SYSTEM HAS BEEN TO THE PLAINTIFF.

17 SO, THIS IS MY CASE MANAGEMENT. EVERY TIME YOU COME  
18 IN HERE, YOU'VE GOT 42 REASONS WHY YOU CAN'T DO SOMETHING. YOU  
19 NEVER GIVE ME ONE GOOD REASON WHY YOU CAN DO SOMETHING. THIS  
20 IS THE SCHEDULE --

21 **MR. FREEBORNE:** RIGHT. WITH RESPECT TO FURTHER  
22 AMENDMENTS, YOUR HONOR, THEY HAVE AMENDED THEIR COMPLAINT  
23 TWICE. NO FURTHER AMENDMENTS ARE APPROPRIATE.

24 WITH RESPECT TO THE EXPERT DISCOVERY, THE MONTH  
25 TIMEFRAME IS, WITH ALL DUE RESPECT, UNREALISTIC.

1           **THE COURT:** EXPERT DISCOVERY, LET'S TALK ABOUT THAT.  
2 HOW WOULD YOU LIKE TO CHANGE THAT?

3           **MR. FREEBORNE:** WELL, YOUR HONOR, I THINK AT A  
4 MINIMUM WE SHOULD HAVE AT LEAST A MONTH TO CONSIDER THE  
5 PLAINTIFF'S -- FIRST OF ALL, THEY SHOULD IDENTIFY THEIR ISSUES  
6 A MONTH AHEAD OF TIME, AND THEN A MONTH FOR US TO FORMULATE AN  
7 EXPERT REPORT. AS I READ THE COURT'S ORDER, IT SEEMS TO BE  
8 COMPRESSED WITHIN A TWO-WEEK TIMEFRAME FOR BOTH THE DEPOSITION  
9 AS WELL AS THE REBUTTAL REPORT.

10          **THE COURT:** I DO SAY THAT FOUR WEEKS BEFORE THE DUE  
11 DATE THEY HAVE TO TELL YOU -- BOTH SIDES HAVE GOT TO SAY WHO  
12 THEY ARE GOING TO USE EXPERTS ON. THAT PART I ALREADY DO HAVE  
13 A MONTH IN THERE. I SAY 28 DAYS. IT SHOULD BE 28, BECAUSE  
14 IT'S A MULTIPLE OF SEVEN.

15           BUT I'M HAPPY TO GIVE YOU MORE TIME ON THE DISCOVERY  
16 PART -- I'M SORRY -- THE EXPERT DEPOSITIONS. SO, LET'S -- SO,  
17 WE'LL CHANGE THAT TO 28 DAYS INSTEAD OF 14. ALL RIGHT. THAT'S  
18 DOABLE.

19           WHAT ELSE?

20          **MR. FREEBORNE:** WITH RESPECT TO THE INITIAL  
21 DISCLOSURES, YOUR HONOR, AGAIN, WE HAVE THE GLOMAR POLICY. TO  
22 THE EXTENT --

23          **THE COURT:** IT'S JUST A POLICY. WE ARE DEALING WITH  
24 THE CONSTITUTION HERE. YOU HAVE A POLICY. THEY HAVE THE  
25 CONSTITUTION.

1           **MR. FREEBORNE:**   RIGHT.

2           **THE COURT:**   WHICH ONE DO YOU THINK IS GOING TO WIN?

3           **MR. FREEBORNE:**   WELL, BUT THE CASE LAW RECOGNIZES, AT  
4   LEAST IN THE TERRORIST WATCHLIST AREA, THAT THE CONSTITUTION  
5   AFFORDS DUE PROCESS, BUT IT'S NOT A SUICIDE PACT.  IT HAS TO BE  
6   COUNTERED-BALANCED AGAINST SIGNIFICANT --

7           **THE COURT:**   YOU SHOULD HAVE EXPLAINED THAT TO THE  
8   COURT OF APPEALS.

9           WE WILL GET EACH ONE OF THESE IN DUE COURSE.  THERE  
10   WILL BE NO SUICIDES.  WE ARE GOING TO GO THROUGH THIS IN A  
11   CAREFUL WAY TO MAKE SURE THAT NATIONAL SECURITY IS PRESERVED,  
12   BUT WE ARE NOT GOING TO JUST SAY NATIONAL SECURITY PREVENTS  
13   THEM FROM SEEING ANYTHING.

14           I LOOKED AT SOME OF THIS YEARS AGO IN YOUR CASE.  IT  
15   WAS ALL STALE INFORMATION.  THERE WAS NO POSSIBLE WAY IT COULD  
16   AFFECT NATIONAL SECURITY.  SO -- AND YET, THAT'S WHAT YOU WERE  
17   CLAIMING.

18           I DON'T KNOW WHAT THE NEW INFORMATION IS.  I DON'T  
19   KNOW WHETHER IT COULD AFFECT -- I'D HAVE TO LOOK AT IT ON A  
20   DISCOVERY-BY-DISCOVERY ITEM BASIS.  SO I SAY TO YOU OVER THERE,  
21   YOU NEED TO GET CRACKING, GET YOUR DISCOVERY REQUESTS GOING.

22           **MR. FREEBORNE:**   YOUR HONOR, JUST ONE FINAL.  THE  
23   PROPOSED CASE MANAGEMENT ORDER HAS A PROVISION FOR DAMAGES.  
24   THIS IS A CASE ABOUT DECLARATORY AND INJUNCTIVE RELIEF.

25           **THE COURT:**   THERE'S NO DAMAGES STUDIES IN HERE;

1 THERE'S NO DAMAGES AT ALL, RIGHT?

2 **MS. PEEK:** THAT'S CORRECT, YOUR HONOR.

3 **THE COURT:** THAT WILL COME OUT. ALL RIGHT.

4 WHAT ELSE?

5 **MR. FREEBORNE:** THAT'S IT FROM THE GOVERNMENT'S  
6 PERSPECTIVE, YOUR HONOR.

7 **THE COURT:** ANY HEARTBURN ON YOUR SIDE?

8 **MS. PEEK:** NO, YOUR HONOR. JUST ON THE POINT OF  
9 AMENDMENT, THE LAST TIME THE COURT CONSIDERED THESE ISSUES, IT  
10 DIDN'T REACH THE 12(B)(6) ARGUMENTS. IF THE COURT REQUIRES  
11 MORE CLARITY WITH REGARD TO ANY OF THOSE ALLEGATIONS, WE THINK  
12 WE CAN AMEND, AND WE SHOULD BE ALLOWED AT LEAST ONE OPPORTUNITY  
13 TO AMEND.

14 **THE COURT:** HERE'S WHAT -- I AM GOING TO JUMP AHEAD A  
15 BIT. THE COURT IS GOING TO HOLD YOU HAVE STATED AT LEAST ONE  
16 POSSIBLE CLAIM; THAT EVERYTHING HAS BEEN SO SHROUDED IN MYSTERY  
17 THAT IT'S UNFAIR TO YOU TO REQUIRE YOU TO -- I'M NOT GOING TO  
18 RULE IN THE ABSTRACT ON THINGS LIKE STIGMA-PLUS AND ALL OF  
19 THAT. I THINK THAT LURKING IN THERE IS A PLAUSIBLE  
20 CONSTITUTIONAL CLAIM THAT YOU HAVE BEEN DENIED DUE PROCESS.

21 UNDER THE COURT OF APPEALS' VIEW, YOUR CLIENT HAS TO  
22 BE TREATED LIKE A CITIZEN OR LIKE ANY LAWFULLY PRESENT RESIDENT  
23 ALIEN, EVEN THOUGH SHE'S NOT A RESIDENT, AND EVEN THOUGH SHE'S  
24 NOT A CITIZEN, EVEN THOUGH SHE'S IN MALAYSIA, AND EVEN THOUGH I  
25 SAID EARLIER SHE'D GIVEN UP ALL OF HER CONSTITUTIONAL RIGHTS BY

1 LEAVING THE COUNTRY, THAT'S NOT WHAT THE COURT OF APPEALS SAID.  
2 THE COURT OF APPEALS AGREED WITH YOU THAT SHE HAD THOSE RIGHTS,  
3 SO I HAVE TO TREAT HER LIKE SHE WAS RIGHT HERE IN THIS COUNTRY.

4 IF SHE WAS RIGHT HERE IN THE COUNTRY AND THEY DID  
5 THAT TO AN ORDINARY CITIZEN, I THINK THE ORDINARY CITIZEN WOULD  
6 HAVE THE RIGHT TO COMPLAIN AND HAVE THEIR DAY IN COURT IN SOME  
7 MANNER, AND HOW CLEARLY YOU -- YOU ARE IN A POSITION WHERE THE  
8 GOVERNMENT HAS MADE THIS SO MYSTERIOUS, IT'S UNFAIR TO YOU TO  
9 SAY YOU'VE GOT TO PLEAD X, Y AND Z.

10 YOU HAVE DONE AS PLAUSIBLE A JOB AS YOU CAN. ONCE WE  
11 GET INTO IT AND YOU FIND SOME AMAZING FACT, IF THERE IS SUCH A  
12 THING IN THIS CASE, MAYBE YOU CAN AMEND THEN. IT WOULD BE FAIR  
13 TO LET YOU DO THAT, BECAUSE IT WOULD BE UNFAIR TO SAY THAT YOU  
14 HAVE TO KNOW WHAT'S BEHIND THE CURTAIN BEFORE YOU GET TO LOOK  
15 BACK THERE. I DON'T KNOW EXACTLY WHAT THE PARAMETERS OF YOUR  
16 LEAVE TO AMEND WILL BE, BUT...

17 **MS. PEEK:** YOUR HONOR, AT A MINIMUM --

18 **THE COURT:** WE ARE GOING TO MUDDLE THROUGH IN THE  
19 BEST WAY WE CAN.

20 YES, WHAT DID YOU WANT TO SAY?

21 **MS. PEEK:** SORRY.

22 AT A MINIMUM WE REQUEST LEAVE TO AMEND TO CONFORM TO  
23 PROOF AT THE CLOSE OF DISCOVERY.

24 **THE COURT:** I DON'T KNOW ABOUT THAT. WE'LL SEE. IS  
25 THIS ENOUGH TIME FOR YOU TO DO YOUR DISCOVERY? I SHORTENED

1 THIS SOMEWHAT BECAUSE IT'S TAKEN SO MANY YEARS TO GET TO THIS  
2 POINT.

3 **MS. PEEK:** YOUR HONOR, I THINK THE ANSWER TO THAT  
4 QUESTION DEPENDS ON WHETHER WE NEED TO DO ANY APPELLATE  
5 PRACTICE WITH THE DISCOVERY. IF WE CAN MAKE IT THROUGH WITHOUT  
6 HAVING TO GO UP ON A WRIT, I THINK IT'S ENOUGH TIME.

7 **THE COURT:** THERE MAY HAVE TO BE IF THE GOVERNMENT  
8 CAN'T -- I CAN'T SAY -- THE GOVERNMENT MIGHT BE VERY PLAUSIBLY  
9 WITHIN ITS RIGHTS TO TAKE A WRIT. SO THAT'S YET TO BE SEEN. I  
10 DON'T KNOW. WE'LL HAVE TO GO WITH THAT ONE BY ONE.

11 ALL RIGHT. I DON'T HEAR ANYTHING ELSE ON THIS, SO  
12 I'M GOING TO GO TO THE OTHER MATTERS.

13 I NEED YOUR HELP ON BOTH SIDES. WE HAVE A PROBLEM ON  
14 OUR HANDS. YOU ARE VERY GOOD COUNSEL ON BOTH SIDES. I NEED  
15 YOUR HELP TO GET THROUGH THIS AND TRY TO DO JUSTICE TO BOTH  
16 SIDES WITHOUT ANY DAMAGE TO NATIONAL SECURITY. THANK YOU.

17 **MS. PEEK:** THANK YOU, YOUR HONOR.

18 **MR. FREEBORNE:** THANK YOU, YOUR HONOR.

19 **MS. PIPKIN:** THANK YOU, YOUR HONOR.

20 (PROCEEDINGS ADJOURNED.)  
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**CERTIFICATE OF REPORTER**

I, JOAN MARIE COLUMBINI, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C 06-0545 WHA, RAHINAH IBRAHIM V. DEPARTMENT OF HOMELAND SECURITY, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

A handwritten signature in black ink, reading "jcolumbini", is positioned above a horizontal line.

JOAN MARIE COLUMBINI, CSR 5435, RPR

MONDAY, JANUARY 14, 2013